B. The carrier's claims of a legal compulsion to file Transmittal No. 873 does not excuse the carrier's failure to offer any "substantial cause" showing

As noted above, the Commission's review of carrier changes to existing long-term service arrangements with customers includes a balancing of the carrier's right to file tariffs "in accordance with its business needs and objectives against the legitimate expectations of customers for stability in term arrangements," RCA Americom, supra, 86 F.C.C.2d at 1201. Aware it has identified no business-related reasons for its proposed tariff changes which the Commission could "balance" against Apollo's "legitimate expectation" and injury, GTE Telephone simply declares any "balancing" unnecessary. Because the tariff filing was not based on any "business needs and objectives" of the carrier (an inherently incredible declaration) but was compelled by a "clear federal mandate," the carrier asserts that it bears no "substantial cause" burden here (D.C. at 38 n. 18). Wrong on all counts.

First, there was no Commission directive to file either Transmittal Nos. 873 or 874. Second, even if there were an external requirement that GTE Telephone file some form of tariff, the specific contents of such a filing -- including those portions which alter the Apollo/GTE long-term arrangements -- were a discretionary matter with the carrier.[18/] Third, whether Transmittal No. 873 was compelled or not, it must still meet the statutory "just and reasonable" standard, and is subject to the Commission's

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[18/] Even the carrier would not claim a "clear federal mandate," for example, that it include maintenance functions in the tariff terms. See pp. 23-24, infra.

requirement, in making that evaluation, of the "aid" of a "substantial cause" showing.

In sum, even if there were a legal requirement that GTE Telephone tariff its arrangement with Apollo, the contents of that filing are subject to the Commission's review. The tariff provisions must still be supported, must still meet Section 201(b) standards and, where changes in long-term service arrangements are involved, must still meet the "substantial cause" test. That GTE Telephone has yet to offer any "substantial cause" showing is a fatal deficiency, for which tariff rejection is the established consequence. See, e.g., AT&T, supra, note 15, 5 F.C.C. Rcd. at 6778-79.

IV. GTE Telephone Has Yet To Provide Any Lawful Basis For Abrogating The Maintenance Agreement

Section 18.31 of the tariff provides, among other things, that GTE Telephone "will . . . maintain the facilities and equipment necessary to furnish the customer with Video Channel Service . . . ." As indicated in Apollo's August 15, 1994 Brief (at pp. 5-8), the Maintenance Agreement committed such activities to Apollo, and provided compensation mechanisms in that regard. That agreement, originally executed in January of 1987, was to have been in effect until May of 1995. (See Apollo Brief, Attachments 4, 5; D.C. at 14.) Unlike certain of the other Apollo/GTE contracts, that agreement was not terminable by GTE Telephone in the absence of a default by Apollo. And unlike the Lease Agreement, the Maintenance Agreement contained no provision making the parties' obligations and privileges subject to FCC or other regulatory actions.

GTE Telephone never asserted a default by Apollo under the Maintenance Agreement. Instead, it simply filed Transmittal No. 873, seeking unilaterally to abrogate the Agreement. And on July 18, 1994, when the tariff was permitted temporarily to become effective, the carrier summarily advised Apollo:

> In accordance with Tariff Transmittal No. 873 GTE California has assumed the maintenance and repair activities.[19/]

At every available opportunity, GTE Telephone has reiterated that both statute and Commission precedent required it to tariff its provision of bandwidth to Apollo for its cable service agreements -- the service described in the parties' Lease Agreement. But never has the carrier made the same assertions concerning system maintenance and repair. And for good reason. The contracting out of such functions by carriers is not prohibited, and often occurs. GTE Telephone's only explanatory statements concerning its reasons for abrogating the Maintenance Agreement are found in its June 1, 1994 Consolidated Reply herein (pp. 15-16):

> [U]nder common carrier service arrangements, carriers typically retain responsibility not only for the provision of service, but also its maintenance, repair and installation. These functions are an integral component of common carrier service responsibility. Currently, GTECA assumes these responsibilities for all other interstate common carrier services it offers pursuant to GTOC Tariff FCC No. 1. Here, GTECA effectively bears the ultimate responsibility for installation and maintenance under the existing GTECA-Apollo Lease Agreement but simply contracts these functions to an outside vendor, Apollo.

The Direct Case is completely silent concerning any "federal mandate" to supersede the Maintenance Agreement by tariff. The

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[19/] Letter dated July 18, 1994, from Don Bogner, District Manager, GTE Telephone Operations to Thomas Robak, President, Apollo CableVision, Inc.

carrier has never maintained that it was legally compelled to do so, as it has claimed concerning the Lease Agreement. Instead, GTE Telephone simply bootstrapped itself into position by filing a tariff with discretionary provisions arrogating maintenance and repair services to itself, and then announcing to Apollo that the tariff extinguished the contract.

Whatever the Bureau's view may be on the required tariffing of the provision of bandwidth to Apollo for cable television service on the Cerritos system, it cannot be said -- and GTE Telephone has never asserted -- that the same factors compelled the tariffing of facilities repair and maintenance. The carrier's action in this regard was wholly voluntary, and was improper.[20/]

CONCLUSION

In discharging its statutory responsibility to ensure that tariff rates, terms and conditions are just and reasonable, the Commission must take into account the contractual predicates for Transmittal No. 873. Where, as here, no tariff has yet been approved, where modifications to a proposed tariff would simply conform the tariff to an earlier agency-approved contract arrangement, and where only the proposed tariff as modified would govern, Armour Packing is inapplicable. On the other hand, Sierra-Mobile, together with the Commission's own "substantial cause" test,

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[20/] It should be emphasized that permitting the Maintenance Agreement would not run afoul of Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54. Continued implementation of that agreement would fall within the Rule's carrier-user exemption, and would not create an impermissible affiliation between Apollo and GTE Telephone. See, e.g., CCI Cablevision v. Northwestern Indiana Telephone Co., 3 F.C.C. Rcd. 3096 (1988), aff'd sub nom. Northwestern Indiana Telephone Co., Inc. v. FCC, 872 F.2d 465 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035 (1990).

affirmatively supports the need to forestall GTE Telephone's abuse of its tariff-filing prerogatives in this case.

Respectfully submitted,

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September 15, 1994

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CERTIFICATE OF SERVICE

I, Roberta Schrock, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 15th day of September, 1994, caused a copy of the foregoing OPPOSITION TO DIRECT CASE ON BEHALF OF APOLLO CABLEVISION, INC. to be served on the following by first-class U.S. mail, postage prepaid:

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